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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 269.

MARGARET M. BRADY, as Administratrix of James P. Brady, deceased,

Petitioner,

vs.

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

BRIEF FOR PETITIONER.

On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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TABLE OF CONTENTS.

	PAGES
Opinions of the Court Below	1
History of the Suits in Admiralty Act	4
Statement of the Case	7
Specification of Errors	11
Point One	12
Point Two	14
Point Three	15
Point Four	20
Conclusion	23

TABLE OF CASES CITED.

Blumenthal v. United States, 30 Fed. (2d) 247	16
Brady v. Roosevelt S. S. Co., 128 Fed. (2d) 169	3
Cory Bros. v. United States, 51 Fed. (2d) 1010	22
Dahn v. Davis, 258 U. S. 421	10
Denton v. Yazoo R. R., 284 U. S. 299	14
Doleman v. Levine, 295 U. S. 221	10
Federal Land Bank v. Priddy, 295 U. S. 229	20
Fleet Corporation v. Greenwald, 16 Fed. (2d) 948	16
Fleet Corporation v. Harwood, 281 U. S. 519	3, 19
Hahlo v. Benedict, 216 Fed. 303	14
Hill v. Leeds, 148 Fed. 880	14
Johnson v. Fleet Corporation, 280 U. S. 320	2, 11, 18
Kiefer & Kiefer v. R. F. C., 306 U. S. 381	3, 20
Linstead v. C. & O. R. R., 276 U. S. 28	14
Lustgarten case, 280 U. S. 320	16

PAGES

Panama Railroad v. Vasquez, 271 U. S. 557 ——— 20

Quinn v. Southgate Nelson, 121 Fed. (2d) 190 ——— 2, 13

Reconstruction Finance v. Menihan, 312 U. S. 81 ——— 20

Sloans Shipyard v. Fleet Corporation, 258 U. S. 549 ——— 3, 15, 20

The Bombay, 38 Fed. 512 ——— 14
The Charlotte, 285 Fed. 84 ——— 14
The Lake Monroe, 250 U. S. 246 ——— 15
The Santa Cruz, 1938 A. M. C. 1505 ——— 14

United States v. McCarl, 275 U. S. 1 ——— 20

STATUTES AND TEXT BOOKS.

46 U. S. C. A., Sec. 1194 ——— 5, 6, 7
46 U. S. C. A., Sec. 1195 ——— 5
46 U. S. C. A., Sec. 1201 ——— 5
46 U. S. C. A., Sec. 1128 ——— 16

New York Insurance Law, Sec. 167 ——— 22

Restatement, Law of Agency, Sec. 440 (a) ——— 22

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BRIEF FOR PETITIONER.

The Opinions of the Court Below.

This case was heard and decided by the Circuit Court of Appeals for the Second Circuit, the bench having been composed of Judges Augustus N. Hand, Harrie B. Chase and Charles E. Clark. It was a two to one decision, Judge Clark having dissented.

The majority opinion held that, because the vessel was owned by the United States and the cause of action was

for a maritime tort, the exclusive remedy of the plaintiff was under the Suits in Admiralty Act. This, notwithstanding that at the time of the accident the vessel was being operated by a private, independent operator, who was sued, and that any judgment recovered would not have to be paid by the United States.

The majority opinion took the position that if a libel *in rem* could have been brought against the vessel, had it been privately owned, then *ipso facto* the exclusive remedy of plaintiff was under the Suits in Admiralty Act, irrespective of any direct and personal liability of the operating agent for its own independent negligence.

The majority opinion ignored the law that an agent is liable for its own torts, as decided by this Court in *Sloan Shipyards* v. *U. S. Fleet Corporation*, and other cases, and its own recognition of that law in Quinn v. Southgate Nelson, 121 Fed. (2d) 190. It based its decision on the *dictum* of this Court in *Johnson* v. *Fleet Corporation*, 280 U. S. 320, wherein the Court said:

> "Putting the United States and the Fleet Corporation on the same footing, and providing remedies to be exclusive in admiralty, would not serve substantially to establish uniformity if suits under the Tucker Act and in the Court of Claims be allowed against the United States, and actions at law, in state and federal courts, be permitted against the Fleet Corporation *or other agents* for enforcement of the maritime causes of action covered by the Act." (Italics supplied.)

The majority seized upon the words "or other agents" as if thereby this Court had judicially legislated an amendment to the Suits in Admiralty Act which confined its application to "vessels owned by the United States, or a corporation with government-owned capital stock, or operated by or for the United States or such corporation".

"Such corporation" referring necessarily to the government-owned capital stock corporation, and not to privately owned corporations, as independent contractors, such as the defendant, Roosevelt Steamship Company.

The Consolidated Navigation Company, party sued in the Lustgarten case, was not a private operator but a mere sub-agent of the Fleet Corporation, under the old form of agency agreement, and any recovery against it would have been paid by the United States.

The effect of the majority opinion was to make it impossible to sue an independent, private corporation at common law for its own negligence if, perchance, such private corporation happened to be operating a government owned vessel at the time, and the injury or death occurred on navigable water.

The minority dissent could find no justification for expanding the plain language of the Suits in Admiralty Act simply because this Court had let slip the words "or other agents". Did this Court thereby intend to take away rights of litigants to ever sue independent agents for their own torts? Hardly, in view of its unbroken line of decisions holding that an agent is liable for its own torts, and may be independently sued.

> Sloan Shipyard v. Fleet Corporation, 258 U. S. 549;
> Fleet Corporation v. Harwood, 281 U. S. 519;
> Kiefer & Kiefer v. R. F. C., 306 U. S. 381.

Nor could the dissenting Judge differentiate between the agent's common law liability for its own torts simply because the negligence happened on the ship rather than on the shore. The wrongdoing constituted the cause of action. Where it took place was incidental.

The opinions are reported in Brady v. Roosevelt Steamship Company, 128 Fed. (2d) 169.

History of the Suits in Admiralty Act.

The Suits in Admiralty Act was enacted to stop the physical seizure of government merchant ships under libels *in rem* or by attachment, thereby causing delay in sailings and inconvenience in furnishing bonds to release the vessels.

At that time, 1920, the vessels were government-owned and were operated by the Fleet Corporation, also government owned. The Government was as solvent as any liability insurance company and, in order to stop the annoyance of libels *in rem* or other seizure under civil process, the Congress substituted the credit of the United States to indemnify claimants, and enacted the legislation (Suits in Admiralty Act) which required all parties having claims against the United States or its Fleet Corporation, in instances where, if privately owned, the vessel would be subject to seizure by libel *in rem*, to proceed by libel *in personam* against the United States in admiralty. There was no intention to deprive claimants against private operators of their common law action.

At that time the government was in the steamship business. Its vessels were being operated by the Fleet Corporation which made sub-agency contracts—the old M. O. 3 and M. O. 4 agreements—with steamship companies for the actual operation of the vessels.

At that time the government was a self-insurer. It had set up the United States P. & I. Agency which handled all personal injury, death and cargo damage claims. It had its own legal staff to defend suits.

Came a time when the government decided to get out of the shipping business and the Shipping Board, the Fleet Corporation and the United States P. & I. Agency were dissolved and ceased to exist.

But the government still owned merchant vessels and the government wanted to build up its merchant marine and to continue the established shipping routes, and to

perpetuate the well-known trade names of its lines. This was to be accomplished by some means *other than for the government to become engaged in the actual operation.* It had some ships; it needed more ships; it wanted vessels which would, in time of war, be available as naval auxilliaries, but it did not want any more Shipping Board or Fleet Corporation headaches!

Congress was equal to the occasion and, after making a clean sweep of the Shipping Board and its *impedimenta,* enacted the Merchant Marine Act of 1936 which created The Maritime Commission. That Act provided a new departure for merchant ship operation—it was to be done by *private operators.*

Title 46, U. S. C. A., Sec. 1194.

The plan was to preserve the existing trade routes then operated by private companies; establish others not already satisfactorily served by an American company, and to sell or lease the vessels under bare boat charter.

> "It shall be the policy of the Commission to encourage private operation of each essential steamship line now owned by the United States by selling such lines to citizens of the United States in the manner provided in Sec. 866 of this title, and in strict compliance with section 864, of this title, *or by demising its vessels on bare boat charter* to citizens of the United States who shall agree to maintain such line or lines in the manner hereinafter provided."
>
> 46 U. S. C. A., Sec. 1195.

To emphasize the fact that the government did not want any departure from accepted admiralty practice in respect of the character of charter to be entered into, it took the precaution to declare:

"The charters to be made by the Commission . . . shall demise the vessels subject to all usual conditions contained in bare boat charters. . . ."

46 U. S. C. A., Sec. 1201.

In anticipation that neither sale nor satisfactory charter would be obtained within the time limitation, it was provided, in such contingency, for the temporary operation of the lines by private operators, as follows:

"All vessels transferred to the Commission by this chapter and now being operated by private operators on lines in foreign commerce of the United States, shall be temporarily operated by the Commission for its account *by private operators* until such time and upon such operating agreements as the Commission may deem advantageous. . . ."

46 U. S. C. A., Sec. 1194.

In other words, where a line was being operated by private operators, and neither sale nor charter had been had prior to the dead line (June 29, 1936), then the Commission could arrange for such *private operator* to continue the operation as before but temporarily only, so as not to interfere with a possible sale or charter.

The whole plan of the legislation was to permit the United States to retire as an operator of merchant ships but to have the Maritime Commission, as an agency, to promote and foster the continuance of established lines and to arrange for the operation of new lines. Actual operation, that is, the physical manning, equipment, maintenance and running of the vessels, was to be in the hands of private operators, the Commission reserving only such supervision over personnel as to provide experienced licensed officers.

Statement of the Case.

The United States, through the Maritime Commission, owned the merchant vessel "Unicoi". This vessel was one of the fleet which had been operated under the trade name of American Pioneer Line.

This operation had been carried on by Roosevelt Steamship Company, as Managing Agent, but the contract would expire by operation of law, to wit, under the Merchant Marine Act of 1936, on the 29th day of June, 1937 (R. 22).

This Merchant Marine Act terminated the old Shipping Board, and the Fleet Corporation and put the United States out of the shipping business. From their ashes rose the Maritime Commission which took title to all vessels then owned by the Shipping Board; was empowered to construct new ones and to sell or charter all vessels to private operators with the design and purpose of establishing a strong merchant marine to continue the operation of established routes, and to organize new routes, in a bid for world trade.

Not having secured a sale, or satisfactory charter, of the vessels navigating the American Pioneer Line before the expiration of the contract with Roosevelt Steamship Company, the Maritime Commission exercised the power given by the Act to have the line temporarily operated for it by a *private operator*, as was mandatory under the law.

46 U. S. C. A., Sec. 1194.

Accordingly, a new agreement was entered into on June 28, 1937, whereby the Roosevelt Steamship Company, a private corporation under the laws of Delaware, succeeded itself as operator of the line and became Managing Agent (R. 21). The contract recites (R. 22):

> "Whereas, the Managing Agent has indicated its willingness to undertake the *management and operation* of the Line. . . ." (Italics supplied.)

The above quoted part of the preamble definitely fixes the independent character of the operator, and it is emphasized by the following provisions (all italics supplied):

A. "The owner hereby designates the Managing Agent as its Managing Agent to *manage, operate and conduct the business of the Line* . . . on behalf of the Owner . . . and under its supervision and direction" (R. 22).

B. "The Managing Agent shall *manage and operate* the said vessels under the trade name American Pioneer Line . . ." (R. 24 (6).

C. "The Managing Agent agrees to *man, equip, victual, supply* and *operate* the vessels, subject to such restrictions and in such manner as the owner may prescribe . . ." (R. 25 (7).

D. "The Managing Agent agrees to *conduct its operations* with respect to the vessels . . . in full compliance with applicable provisions of law, and particularly the Act, . . . and with due regard to *wage and manning scales* . . ." (R. 25 (8).

E. "The Managing Agent shall . . . exercise reasonable care and diligence to maintain the vessels in a *thoroughly efficient state of repair*, covering . . . *tackle* . . . *equipment* . . . and will effect *maintenance and voyage repairs and replacements* . . ." (R. 26 (11).

F. "The Owner shall provide . . . hull, machinery and port risk insurance, and the *Managing Agent shall provide*, for the account of the Owner and subject to its approval, *Protection and Indemnity*, and such other forms of insurance as the Owner may deem necessary" (R. 28 (14).

G. The Managing Agent is obligated to provide a bond "to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the Managing Agent contained in this agreement" in the amount of $80,000.00 (R. 29 (18).

H. "Any agents selected or appointed by the Managing Agent shall be solely the agents of said Managing Agent and not, in any respect, the agents of the Owner . . ." (R. 30 (23).

I. "The Owner may terminate the agreement if (a) A voluntary sale by the Managing Agent of this agreement, or any interest therein, or an assignment . . . *whereby the management or operation of the above described Line or vessels shall be divested from the Managing Agent* . . ." (R. 31 (25).

This agreement was substantially a bare boat charter of the vessels to Roosevelt Steamship Line, the Owner retaining only such supervision as would tend to safeguard and protect its properties.

The steamship "Unicoi" docked in New York on the morning of July 9, 1938 and immediately put over a long ladder from ship side to dock. It was the duty of Brady, the Customs Inspector, to promptly go aboard that vessel in the performance of his duties. While ascending the ladder a defective and rotton rung gave way under his weight; he dropped to the next rung below, still holding on with his hands. He obtained a new footing and continued on up, boarded the vessel and attended to his duties.

From internal injuries sustained when his body dropped as the rung broke, he died on July 20, 1938.

Brady, the deceased, as a U. S. Customs Inspector, was a civil employee of the government. If such employees accept compensation they cannot sue the government in personal injury or death cases. Once compensation is

accepted by the widow the sole and exclusive remedy *against the United States* continues to be under the United States Employees' Compensation Act. This Act, however, does authorize a suit against a "person other than the United States".

Mrs. Brady, widow, has two children, Virginia, aged 15, and James, aged 20, at the date of their father's death. She has accepted compensation from the United States Employees' Compensation Commission.

Notwithstanding that the widow took compensation, she has a claim for damages against the wrongdoer and her two children have quite a substantial amount at stake, to wit, about $7,550.00 each. They have a legal right to collect these damages notwithstanding their mother had accepted compensation.

Doleman v. Levine, 295 U. S. 221.

The deceased, Brady, was a civil employee of the government and, therefore, the decision of the Circuit Court of Appeals holding that the Suits in Admiralty Act affords his administratrix the only remedy, is an empty and valueless determination, for there can be no indemnity suit against the United States on behalf of a civil employee, either at law or in admiralty, where there has been an election to take, and acceptance of, federal compensation.

Dahn v. Davis, 258 U. S. 421.

His widow, as administratrix, brought a common law action under the death statute of New York and, upon trial, recovered a judgment of $22,760.00.

The defendant never questioned, on appeal, the negligence which caused the accident, and the resulting death, nor was any attack made upon the amount of the verdict.

The defendant urged by motion before trial (R. 11) and also upon the trial (R. 90) the contention that the Court did not have jurisdiction of the subject-matter, be-

cause the accident was a maritime tort; the vessel was owned by the United States; the Roosevelt Steamship Company was a mere agent of the United States operating the boat, not on its own behalf but on behalf of the United States; that any judgment recovered would be paid out of the Treasury of the United States and, therefore, the sole remedy was against the United States under the Suits in Admiralty Act.

At the trial the defendant assumed, for the argument, that the Roosevelt Steamship Company did independently operate and control the vessel and employed the members of the crew (R. 90) but contended that the judgment would have to be paid by the United States and, therefore, under the doctrine of Johnson v. Fleet Corporation, 280 U. S. 320, the sole remedy was under the Suits in Admiralty Act.

Both the formal motion before trial and the procedural motion at the trial were denied.

The defendant appealed this jurisdictional question and the Circuit Court of Appeals, by a two to one decision, reversed the judgment and directed that the complaint be dismissed, stating that the sole remedy was against the United States under the Suits in Admiralty Act.

This Court granted certiorari.

Specification of Errors.

One.

The Circuit Court erred not only in following the *Johnson v. Fleet Corporation* decision, 280 U. S. 320, but in interpreting it to hold that mere ownership of a vessel by the United States *ipso facto* makes the Suits in Admiralty Act the exclusive remedy. The Suits in Admiralty Act applies only to corporations whose capital stock is owned by the United States.

Two.

The Circuit Court erred in ignoring the fact that the defendant sued was a private, independent corporation no stock of which was owned by the government, and that under the operating agreement it was a responsible agent, personally liable for its torts, and, as such, subject to suit under numerous decisions of this Court.

Three.

The Circuit Court failed to note the absolute difference between the Fleet Corporation and its sub-agent, Consolidated Navigation Company, as present in the Johnson and Lustgarten cases, and the Roosevelt Steamship Company, in this Brady case, and, therefore, the Circuit Court misapplied the Johnson-Lustgarten decision.

Four.

The United States will not have to pay the judgment and hence, on this ground, the Suits in Admiralty Act has no application.

POINT ONE.

The Circuit Court erred in holding that mere Government ownership, of and by itself, was all that was necessary to make the Suits in Admiralty Act applicable, and disregarding the independant contractor character of the agent in charge of operations.

The Suits in Admiralty Act comes into effect only when, for a maritime tort, the vessel, if privately owned, would be subject to seizure under a libel *in rem*, or when the United States is so interested that it would have to pay the judgment.

In this case there was no attempt at seizure. A proceeding *in rem* in admiralty would never have been attempted for that would have necessitated intervention by the United States, and the libel would have been dismissed on motion.

The plaintiff had no claim against the owner or against the vessel. Her claim was solely against the Roosevelt Steamship Company, not only a solvent defendant but one fully covered by liability insurance against plaintiff's claim.

The Roosevelt Steamship Company was a private, domestic corporation of Delaware, and none of its stock was owned by the United States or any of its agencies. The plaintiff sought to establish a direct liability against this independent agent for its own torts, a right long recognized by this Court even as against the Fleet Corporation (Sloan Shipyard case, 258 U. S. 549), and by the Circuit Court of Appeals, Second Circuit, against a similar agent under an identical Maritime Commission agreement.

Quinn v. Southgate Nelson, 121 Fed. (2d) 190;
Cert. denied 314 U. S. 682.

The fact that the government owned the boat was purely a circumstance but one which should have had no influence where the cause of action was *solely against the agent for the agent's own negligence.*

If the decision complained of is sound then it effectually nullifies a long line of cases in this Court which have held that an agent is subject to suit for its own torts.

The Suits in Admiralty Act does not apply to this case merely because the government owned the vessel, and where the government will not have to pay the eventual recovery.

POINT TWO.

The defendant, Roosevelt Steamship Company, under the operating agreement pursuant to the Merchant Marine Act of 1936, was an independant agent, charged with the duty and responsibility of operating the vessels and of keeping them and their appliance seaworthy and in repair, and it was error to have set aside the verdict, and holding that the sole remedy was in admiralty.

The agreement obligated the Roosevelt Steamship Company to actually operate the vessels; to man, equip and supply the vessels; to observe manning and wage scales; to keep the vessel in repair; to exercise care and diligence to save the owner against loss or damages; to provide liability insurance and to give a bond for faithful performance.

True, in practice, the Owner supervised the selection of the officers and paid their salaries, but these officers and crew were under the orders of the steamship company's marine managers who directed them in the execution of their work. Under these circumstances they were the servants of the steamship company regardless of who actually paid their salaries.

Linstead v. C. & O. R. R., 276 U. S. 28;
Denton v. Yazoo R. R., 284 U. S. 299.

The steamship company became the owner *pro hac vice*. It was immaterial who hired the officers and crew, the relationship of master and servant existed between Roosevelt Steamship Company and the ship's personnel.

Hahlo v. Benedict, 216 Fed. 303 (2);
Hill v. Leeds, 148 Fed. 880;
The Charlotte, 285 Fed. 84;
The Bombay, 38 Fed. 512;
The Santa Cruz, 1938 A. M. C. 1505.

The Circuit Court erred in depriving this petitioner of her judgment which was authorized under the facts and the law.

POINT THREE.

The Circuit Court erred in following the Johnson-Lustgarten decision, which was under the old Fleet Corporation setup, and not authority for the new relationship under the Merchant Marine Act of 1936 and the operating contract thereunder which requires a private operator.

A brief historical review may be helpful in following the evolution of the relationship between the government and shipping companies.

The Act which created the United States Shipping Board was enacted in 1916 and placed all merchant vessels owned by the United States in the same category as privately owned vessels.

In 1919 this Court held that, under the said Act of 1916, a merchant vessel owned by the United States was subject to seizure like any other vessel.

The Lake Monroe, 250 U. S. 246.

To obviate the effect of that decision the Congress passed the Suits in Admiralty Act in 1920.

That Act was designed solely to prevent seizure of United States merchant vessels under libels *in rem* and to compel claimants to sue the owner in admiralty in respect of claims against either the government-owned vessel or the government-owned Fleet Corporation.

The Fleet Corporation, despite the fact that all of its stock was owned by the United States, was held by this Court (1922) to be independently liable for its own negligence and torts, sovereign immunity not extending to the Agent.

Sloan Shipyards v. Fleet Corporation, 258 U. S. 549.

That decision definitely and finally settled the question as to whether agents, when operating government vessels, were personally liable for their own negligent acts.

Thereafter the Courts held that direct suits may be brought against the Fleet Corporation at common law.

> Fleet Corp. v. Greenwald, 16 Fed. (2d) 948;
> Blumenthal v. United States, 30 Fed. (2d) 247
> and numerous others.

Such continued to be the law and it was generally applied by the Courts. Congress could not have been ignorant of it and certainly the government officials, who inspired the enactment of the Merchant Marine Act of 1936, knew all about it.

Yet, the Merchant Marine Act of 1936 not only expressly preserved to seamen their rights "under any provision of existing law" (46 U. S. C. A., Sec. 1128-f) but, notwithstanding Congress had under consideration the providing for insurance covering among other things, marine and war risk for "personal effects of masters, officers and crews thereof" (46 U. S. C. A., Sec. 1128-a) and took the precaution to enact that actions therefor shall be under the Suits in Admiralty Act (46 U. S. C. A., Sec. 1128-d) nevertheless did nothing to change the existing law that independent operating agents of government-owned merchant ships were personally liable for their own torts, and that common law suits could be brought against such agents without offending the Suits in Admiralty Act.

In the Lustgarten case, 280 U. S. 320, the vessel was operated by the Consolidated Navigation Company as a sub-agent of the Fleet Corporation. The government owned the vessel. The Fleet Corporation was wholly government-owned and it was performing a function of government, and its sub-agent was similarly performing a governmental function. The government would have to pay any judgment against it.

The fact that the Consolidated Navigation Company was a mere sub-agent of a government-owned corporation, performing service for and on behalf of the government, brought it under the terms of the Suits in Admiralty Act.

Had the Consolidated Navigation Company, a private corporation, contracted independently with the Shipping Board to man, equip and operate the government vessel, the decision doubtless would have been in accordance with this Court's decision in the Sloans Shipyard case.

There is a vast difference between operations under the old M.O. 3 and M.O. 4 forms of sub-agency contracts with a government-owned corporation, and a Managing Agreement under a statute which expressly requires that the line be managed and operated by a *private operator*.

We may safely disregard all the old forms and adjudications thereunder. They illustrate no feature of the Brady case. Even the Lustgarten case throws little light because it was predicated on the old sub-agency agreements. Even in the petition for certiorari in the Lustgarten case, the United States said (p. 7):

> "The operating agent likewise is to be held a public agent without responsibility unless for *personal negligence.*" (Italics supplied.)

The Johnson-Lustgarten cases, decided by this Court in 1930, were tort actions at law against the Fleet Corporation and the Consolidated Navigation Company, its sub-agent, which had been engaged in the execution of an agreement to operate vessels of the United States.

Under the particular facts of those cases it was seen that the Consolidated Navigation Company was performing a governmental function under an agency agreement with the Fleet Corporation; that under that arrangement the United States would have to pay the eventual judgment, which facts brought those cases squarely within the provisions and intendment of the Suits in Admiralty Act. We quote from the opinion:

"On the facts above stated it is clear that each of the causes of action arose out of the possession or operation of a merchant vessel by or for the United States. Directly or mediately, *the money required to pay the judgment against* any one of the defendants in these cases *would come out of the United States. It is the real party affected by all these actions.*" (Italics supplied.)

Johnson et al. v. Fleet Corporation, 280 U. S., at pages 326-327.

Therefore, for torts occurring on a merchant vessel of the United States, while operated for the United States by a governmental agent and sub-agent, under the old Shipping Board forms, and for which the United States was obligated to respond in damages, the exclusive remedy was by suit in admiralty against the United States.

But, where the facts are totally different, as where, instead of a public agent, or its sub-agent, operating the vessel, there was a private corporation, no stock of which was owned by the government; where such operator was engaged in a private enterprise, acting under the mandate of a statute which specified operation by a "private operator"; where the United States would not have to pay any judgment recovered against such private corporation for such agent's own negligence, then, under such circumstances, the Johnson-Lustgarten decision would have no application.

This Brady case embodies all those distinguishing facts which takes it without the Johnson-Lustgarten decision. Brady sued an independent contractor or agent upon its personal liability for its own negligence. The agent is not only personally solvent but has furnished a sufficient liability bond to guarantee payment of the judgment. The United States does not own any stock in the Roosevelt Steamship Company. The United States is not the real

party in interest, and has never suggested any interest in court so as to have had the litigation proceed under the Suits in Admiralty Act. Even if the Roosevelt Steamship Company was operating a government-owned vessel it did so as an independent agent and did not become clothed with the immunity enjoyed by the government. It was directly liable for its own wrongs, notwithstanding it was an agent.

Fleet Corporation v. Harwood, 281 U. S. 519;
Sloan Shipyards v. Fleet Corporation, 258 U. S. 549;
Reconstruction Finance v. Menihan, 312 U. S. 81;
Keifer & Keifer v. Reconstruction Finance, 306 U. S. 381;
Federal Land Bank v. Priddy, 295 U. S. 229.

The Circuit Court of Appeals was in error when it concluded that the relationship of Roosevelt Steamship Company to The Maritime Commission was practically the same as that between the Consolidated Navigation Company and the Fleet Corporation in the Johnson-Lustgarten cases.

The Fleet Corporation was entirely government-owned. The Roosevelt Steamship Company is a private, Delaware corporation, no stock of which is owned by the government.

The Consolidated Navigation Company was a mere sub-agent of the Fleet Corporation, under the old agency agreements, for the performance of governmental functions for its principal. The Roosevelt Steamship Company operates under the Merchant Marine Act of 1936 which expressly required the operations to be by a private operator.

The United States was obligated to pay the damages incurred for personal injury or death during operations by the Fleet Corporation and its sub-agents. The United States is not liable for the payment of any judgment against Roosevelt Steamship Company because (a) the

Roosevelt Steamship Company is an independent contractor and individually liable for its own negligence, and (b) a liability bond, required by the contract, fully indemnifies the judgment-creditor.

There is not the slightest similarity between the situation which was before this Court in the Johnson-Lustgarten cases and that now presented by this Brady record.

And since there was a right of action *ex delictu* against the agent it was enforceable at common law, and the decision that relief can only be had in admiralty was erroneous.

Panama Railroad v. Vasquez, 271 U. S. 557;
United States v. McCarl, 275 U. S. 1.

POINT FOUR.

The United States will not have to pay the judgment and, hence, another reason why the Suits in Admiralty Act has no application to this case.

The United States will not have to pay the judgment in this case, and we doubt that it will voluntarily relieve the insurance carrier from its obligation under the policy.

There are four good and sufficient reasons why the United States will not have to pay, to wit:

A. To pay the damages is the personal and direct liability of the agent as an independently liable party.

B. Indemnity and liability insurance protects the United States against loss arising from personal injury or death claims during its operations, and due to its negligence.

C. If the United States was financially interested it would have specially appeared, suggested its inter-

est and moved to dismiss, since the sole remedy would then be under the Suits in Admiralty Act. Its attorney did not do this but let the *defendant* raise the point by motion, supported by the affidavit of the United States Attorney!

D. Brady, the tort-judgment-creditor may proceed in a direct action against the insurance carrier, under the policy, as provided by New York Insurance Law.

The United States is not interested in the outcome of the case. The effort at the trial to show that the judgment would have to be paid by the United States was a mere effort to becloud the issue. Had it been true that the United States was interested because eventually liable to pay, it would have entered the case at the beginning, suggested its interest and moved to dismiss the common law action. It did no such thing and for the manifest reason that the United States was not interested. No United States attorney appeared for the defendant and it is inconceivable that Mr. Collins, District Counsel of the United States Maritime Commission and Special Assistant to the United States Attorney for the Southern District of New York (R. 84) should have failed to protect his client, the United States, by timely suggestion of its interest, and ask that the case proceed under the Suits in Admiralty Act.

It is obvious that the reason he made no such move was because he knew and realized that there was no basis for any claim that the United States would have to pay the judgment.

The defendant made the motion (R. 11-90) and Mr. Collins permitted himself to be called as a witness for the defendant to *testify* that the United States would have to pay the judgment when, if that had been the case, he surely would have appeared in his official capacity, suggested the interest of the United States and requested that the com-

mon law case abate because a suit in admiralty was the exclusive remedy.

And if there had been any basis in fact for the claim that the United States would have to pay the judgment, the attorneys for the steamship company would have insisted that the government appear and suggest its interest.

The defendant agent never would have chanced a jury verdict individually against it when the burden rested on the principal, the United States, which could have had a judge pass upon the issues.

The claim that the United States will have to pay the judgment is specious.

Furthermore, the judgment is against the Roosevelt Steamship Company. The liability policy, insured the Roosevelt Steamship Company as well as the United States. That policy was issued to protect tort-judgment-creditors in making collection of their judgments. Brady would have the right to sue the insurance company to collect the judgment, if the judgment remained unpaid for 30 days after notice of entry given.

New York Insurance Law, Sec. 167 (1-b).

Of course the requirement in the Operating Agreement of a P. & I. policy was not an idle provision. The policy was given. The insurer is liable. The United States is not liable and will not have to pay. The claim to the contrary was injected into the case for no other purpose than an attempt to bring this case within the Suits in Admiralty Act.

And, of course, there is no legal obligation upon the United States, the principal, to re-imburse the Agent for damages occasioned by the Agent's own tort.

Restatement, Law of Agency, Sec. 440 (a);
Cory Bros. v. United States, 51 Fed. (2d) 1010 (10).

CONCLUSION.

The decision of the Circuit Court of Appeals, if sustained, will result in the complete loss of the judgment, because, notwithstanding the adjudication that the remedy is under the Suits in Admiralty Act, no such suit can be brought. The decedent, Brady, was a Customs Inspector and therefore a civil employee of the United States. His widow accepted Federal Employees' Compensation and such acceptance ended her rights except as against a third party.

She has sued such third party because the decisions of this Court gave her that right.

The Roosevelt Steamship Company, as an agent, was liable for its negligent conduct resulting in injury or death, and whether the accident happened on ship or on shore can make no difference as to an action at law or a suit in admiralty, so far as the agent, as an agent, is concerned.

To hold that Quinn, killed on a bridge, can sue an agent at common law, and that if he had been killed on the ship he would have to sue the United States, in admiralty, simply because the accident was on the ship, regardless of the legal liability of the agent for the accident, seems without support either in law or logic.

Yet that is just the effect of the Brady decision. If the agent's negligence had killed Brady on the dock, then his widow could have sued at law, but if the negligence had killed him on the ship, then the suit must be under the Suits in Admiralty Act merely because the government owned the vessel, notwithstanding the Owner was neither liable nor suable.

Such a proposition offends the decisions of this Court and shocks the legal mind.

The old relationship between the Shipping Board Fleet Corporation and its sub-agents has ended.

The decisions dealing with that old relationship cannot illustrate the present-day arrangement, under a new stat-

ute, which specifically requires operation by a private operator.

The inadvertent use of the words "or other agents" in the *Johnson-Lustgarten* decision should not be held to work an amendment to the Suits in Admiralty Act by judicial pronouncement.

No fact in this Brady case makes the Suits in Admiralty Act applicable. The action was properly brought against the agent at common law and the decision of the Circuit Court of Appeals should be reversed and the judgment reinstated.

Respectfuly submitted,

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